

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

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ELAINE STEVENSON,  
Plaintiff,

NO. CIV. S 03-0201 MCE PAN

v.

MEMORANDUM AND ORDER

COUNTY OF SACRAMENTO, CRAIG  
HILL, JOHN McGINNESS and DOES  
1 through 10, inclusive,

Defendants.

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Through this motion, Defendants move for Judgment as a  
Matter of Law ("JMOL") under Federal Rule of Civil Procedure<sup>1</sup>  
50(b).<sup>2</sup> Alternatively, the defense requests that the Court order  
a new trial on grounds that the verdict reached by the jury was

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<sup>1</sup>All further references to "Rule" or "Rules" are to the  
Federal Rules of Civil Procedure unless otherwise noted.

<sup>2</sup>At the end of Plaintiff's rebuttal case defense counsel  
previously moved for JMOL under 50(a). That motion, which was  
denied, was a prerequisite for bringing the present Rule 50(b)  
motion. Janes v. Wal-Mart Stores, Inc., 279 F.3d 883, 886-87  
(9<sup>th</sup> Cir. 2002).

1 against the weight of the evidence and resulted in a miscarriage  
2 of justice. As set forth below, Defendants' Motion is denied.

3  
4 **ANALYSIS**

5  
6 **A. Motion for Judgment as a Matter of Law**

7 A JMOL is proper only if "the evidence, construed in the  
8 light most favorable to the nonmoving party, permits only one  
9 reasonable conclusion, and that conclusion is contrary to that of  
10 the jury." White v. Ford Motor Co., 312 F.3d 998, 1010 (9<sup>th</sup> Cir.  
11 2002). To justify relief through a JMOL, there must be a  
12 "complete absence of probative facts to support ... [the]  
13 conclusion reached so that no reasonable juror could have found  
14 for ... [the] nonmoving party." Eich v. Board of Regents for  
15 Central Missouri State Univ., 350 F.3d 752, 761 (8<sup>th</sup> Cir. 2003).

16 Although Defendants also request a Judgment Notwithstanding  
17 the Verdict ("JNOV"), that in essence is an outdated reference to  
18 what now is properly denominated as a JMOL. See United States ex  
19 rel. A Homecare, Inc., v. Medshares Management Group, Inc., 400  
20 F.3d 428, 447 n. 14 (6<sup>th</sup> Cir. 2005). The standards for granting  
21 a JMOL and JNOV are identical.

22 Defendants argue that they are entitled to JMOL because of  
23 the jury's finding that Defendant McGinness would have made the  
24 decision to transfer Elaine Stevenson irrespective of her  
25 protected speech arising from the People v. Luna case. Because  
26 McGinness made the ultimate decision to transfer Stevenson out of  
27 the Homicide Bureau, the defense contends that Defendant Hill  
28 cannot be liable since McGinness' decision was based on

1 legitimate grounds.

2 In Mount Healthy City Bd. Of Educ. v. Doyle, 429 U.S. 274  
3 (1977), the Supreme Court articulated the proper analysis for  
4 assessing claims of illegal retaliation for the exercise of  
5 protected speech. Under that analysis, once it is determined  
6 that the speech in question is protected (an uncontroverted fact  
7 in the present case), a plaintiff must show that such speech was  
8 a "substantial" or "motivating" factor in the decision to take  
9 adverse action against him/her. If the plaintiff carries that  
10 burden, then the burden shifts to the defendant to show, by a  
11 preponderance of the evidence, that the same decision would have  
12 been reached even in the absence of the protected conduct. Id.  
13 at 287.

14 The defense claims here that because the jury found (in  
15 Question No. 3 of its verdict) that Stevenson's protected speech  
16 was not a substantial factor in McGinness' decision to transfer  
17 her, any improper motive of Hill's in merely recommending the  
18 transfer is "superceded and nullified". The defense hence  
19 contends that no damages can flow from McGinness' decision under  
20 a Mount Healthy analysis.

21 To support its analysis, the defense relies on out-of-  
22 circuit authority, most prominently the Eighth Circuit's decision  
23 in Ingrum v. Nixa Reorganized School Dist., 966 F.2d 1232 (8<sup>th</sup>  
24 Cir. 1992). In that case, the jury awarded the plaintiff damages  
25 even though it found that the school district would not have  
26 renewed plaintiff's teaching contract irrespective of her  
27 protected speech in complaining about certain conduct on the part  
28 of the school principal. The district judge entered JNOV on

1 grounds that this posed an inconsistency. In affirming the  
2 district court's decision in that regard, the Eighth Circuit  
3 found it did not matter that the principal's underlying  
4 recommendation was "impermissibly motivated". Because only the  
5 school board had actual power to nonrenew plaintiff's contract,  
6 the Ingrum court reasoned that the board's decision not to do was  
7 made regardless of plaintiff's protected speech. According to  
8 the defense herein, the decision in Ingrum is on all fours with  
9 the present case and mandates that JMOL be granted.

10 The problem with Defendants' argument, as Plaintiff points  
11 out, is that Ingrum is not Ninth Circuit precedent, and cases  
12 that have been decided by the Ninth Circuit appear inapposite.  
13 In Ostad v. Oregon Health Sciences University, 327 F.3d 876 (9<sup>th</sup>  
14 Cir. 2002), a medical resident claimed that his termination by  
15 Oregon Health Sciences University ("OHSU") was motivated by his  
16 questioning of billing practices employed by an OHSU physician,  
17 Dr. Alan Seyfer. Plaintiff's challenge to Dr. Seyfer's decision  
18 to place him on administrative leave, allegedly as a result of  
19 patient treatment issues, was referred to a panel of five doctors  
20 for review. That panel, which knew nothing about plaintiff's  
21 challenge to Dr. Seyfer's billing practices, ultimately decided  
22 that plaintiff should be terminated. At trial, the jury  
23 nonetheless found that defendants had failed to establish that  
24 plaintiff would have been terminated in the absence of his  
25 protected speech activity in protesting the billing practices.  
26 The district court denied defendants' JMOL request, which was  
27 made on grounds that the panel's decision to terminate plaintiff  
28 without knowledge of those activities cut off any chain of

1 causation between Seyfer's improper motives and plaintiff's  
2 ultimate termination.

3       The Ninth Circuit, after framing the issue in terms of  
4 whether the jury "properly could have found, on the record before  
5 it, that [plaintiff's] protected conduct played a substantial or  
6 motivating factor in the decision to terminate his residency",  
7 flatly disagreed with the defense argument that the panel's  
8 "independent decision severed any link between Seyfer's allegedly  
9 improper motives and [plaintiff's] termination." Id. at 882.  
10 The Ostad court approvingly cited the Ninth Circuit's earlier  
11 decision in Gilbrook v. City of Westminster, 177 F.3d 838, 855  
12 (9<sup>th</sup> Cir. 1999). Gilbrook held that a subordinate like Defendant  
13 Hill cannot use the nonretaliatory motive of a superior  
14 (McGinness) as a shield against liability if that superior would  
15 never have considered adverse action *but for* the subordinate's  
16 retaliatory conduct. Although the Ostad court also cited  
17 Gilbrook for the proposition that it did not express any opinion  
18 on what the result would be if the facts "showed that the final  
19 decision-maker made a wholly independent, legitimate decision to  
20 discharge the plaintiff, uninfluenced by the retaliatory motives  
21 of a subordinate" (Id. at 883), the circumstances of Ostad  
22 demonstrated that Dr. Seyfer laid the groundwork for and  
23 initiated the discipline hearings that resulted in plaintiff's  
24 termination. The Ninth Circuit therefore found that Seyfer could  
25 properly be held liable for his recommendation even though the  
26 panel, as the final decision maker, was not aware of plaintiff's  
27 protected activity.

28       As indicated above, the Court, in determining whether JMOL

1 is appropriate, must resolve all inferences in favor of Detective  
2 Stevenson as the non-moving party. Utilizing that standard, the  
3 jury could have determined that Hill's improperly-motivated  
4 recommendation in fact "laid the foundation" for the process  
5 leading to Stevenson's transfer. That factor, along with the  
6 fact that Dr. Seyfer's testimony as to the plaintiff's competence  
7 was relied on by the hearing panel, was what the Ninth Circuit  
8 accepted in Ostad as the underpinning for Seyfer's liability.  
9 Here, the jury heard testimony that McGinness himself had no  
10 adverse dealings with Detective Stevenson prior to discussions  
11 initiated by Defendant Hill about Plaintiff's allegedly  
12 unacceptable behavior, and in fact McGinness had given Plaintiff  
13 positive performance evaluations. Given those circumstances, the  
14 jury could have reasonably concluded that McGinness would not  
15 have taken the action he did absent Hill's recommendations --  
16 which the jury found were improperly motivated.

17 As was the case in Gilbrook, the jury found here that while  
18 Hill's initial recommendation was made with a retaliatory motive,  
19 the ultimate decision by McGinness did not share that motive.  
20 Nonetheless, where the retaliatory motive "set in motion the  
21 chain of events that led .... to the adverse employment action",  
22 an employee like Hill is not immunized against liability.  
23 Gilbrook, 177 F.3d at 855. That reasoning supports the jury's  
24 findings against Hill in this case. In addition, the evidence,  
25 as construed most favorably to Stevenson, does not unequivocally  
26 show that McGinness' decision was "wholly independent" from the  
27 recommendations he received from Hill so as to absolve Hill from  
28 any liability.

1 Because the jury's finding is not incompatible either with  
2 the facts or with applicable case law, JMOL is inappropriate and  
3 must be denied.

4  
5 **B. Motion for New Trial**

6 As an alternative to their request for JMOL, Defendants also  
7 argue that a new trial should be ordered because the verdict  
8 ultimately reached by the jury was against the weight of the  
9 evidence. A district court has discretion to grant a new trial  
10 when the jury's verdict is contrary to the "clear weight of the  
11 evidence", or is based on false evidence. Rattrary v. City of  
12 Nat'l City, 51 F.3d 793, 800 (9<sup>th</sup> Cir. 1994). A verdict is  
13 against the clear weight of the evidence when, after giving full  
14 respect to the jury's findings, the judge "is left with the  
15 definite and firm conviction that a mistake has been committed by  
16 the jury." Landes Const. Co., Inc. v. Royal Bank of Canada, 833  
17 F.2d 1365, 1371 (9<sup>th</sup> Cir. 1987). A new trial may also be ordered  
18 when needed to prevent a "miscarriage of justice". Rattray, 512  
19 F.3d at 800. In ruling on a motion for new trial, "the judge can  
20 weigh the evidence and assess the credibility of witnesses, and  
21 need not view the evidence from the perspective most favorable to  
22 the prevailing party." Air-Sea Forwarders, Inc. v. Air Asia Co.,  
23 Ltd., 880 F.2d 176, 190 (9<sup>th</sup> Cir. 1989).

24 In support of their request for a new trial, the defense  
25 makes the same argument enumerated above -- that Hill was not the  
26 ultimate decision maker -- in attempting to argue that the  
27 verdict was against the weight of the evidence and/or would  
28 result in a miscarriage of justice. Defendants also argue that

1 virtually every witness except Plaintiff and her partner, Dave  
2 Wright, testified that Plaintiff was confrontational and  
3 disrespectful. They argue that the jury's verdict should not  
4 stand against that "overwhelming" evidence. Plaintiff, on the  
5 other hand, argues that Defendant Hill made the recommendation to  
6 transfer Plaintiff Stevenson just two months after she testified  
7 in the People v. Luna suppression hearing, armed with instances  
8 of alleged misconduct which for the most part occurred after  
9 Stevenson reported Hill's conduct regarding Luna to the District  
10 Attorney.

11 Although there was considerable evidence that Stevenson was  
12 transferred due to her own volatile behavior, evidence indicating  
13 that Hill made the recommendation to transfer Plaintiff soon  
14 after she testified at the People v. Luna suppression hearing was  
15 also presented. The jury decided that Hill's retaliatory animus  
16 as a result of People v. Luna prompted the process that led to  
17 her transfer. That conclusion was a plausible one and not  
18 contrary to the clear weight of the evidence. The Motion for New  
19 Trial is denied.

### 20 21 **C. Verdict Against Defendant McGinness**

22 In assessing a verdict like the one returned by the jury in  
23 the initial phase of this case, which consists of special  
24 interrogatories comprising a general verdict, the Court has a  
25 duty under the Seventh Amendment to harmonize any seemingly  
26 inconsistent answers if permitted by a fair reading of the  
27 verdict as a whole. See White v. Ford Motor Co., 312 F.3d 998,  
28 1005 (9<sup>th</sup> Cir. 2002).



1 In this case, although the jury's answer to Question No. 4  
2 found that Defendant McGinness would have transferred Plaintiff  
3 regardless of her protected speech arising from the People v.  
4 Luna case (in response to the same question the jury also found  
5 that Defendant Hill would not have recommended her transfer  
6 absent her involvement in Luna), the jury nonetheless proceeded  
7 to conclude in response to Question No. 5 that Stevenson had  
8 suffered damage as a result of the acts or omissions of both Hill  
9 and McGinness. In Question No. 6, the jury determined that  
10 Plaintiff suffered past economic loss totaling \$20,000 and non-  
11 economic damages in the amount of \$75,000 due to those acts or  
12 omissions.

13 At oral argument on the post-trial motions in this case,  
14 held on September 26, 2005, defense counsel contended that a fair  
15 reading of the verdict as a whole cannot support imposition of  
16 any damages against Defendant McGinness, since the jury concluded  
17 that he acted without knowledge of Plaintiff's protected speech.

18 The Court agrees. The jury concluded that Hill did have  
19 retaliatory animus in recommending Plaintiff's transfer and could  
20 therefore incur liability on that basis for the transfer pursuant  
21 to the Ninth Circuit's holdings in Ostad and Gilbrook as  
22 discussed above. However, the jury also concluded in its answers  
23 to the special interrogatories that McGinness was not  
24 impermissibly motivated in making the actual decision to transfer  
25 Plaintiff. As such McGinness is not personally liable for that  
26 decision, and cannot be responsible for resulting *monetary*  
27 damages, even if Plaintiff was in fact "damaged" by his approval  
28 of Plaintiff's transfer. In the Court's view, this is the only

1 fair reading of the jury's response to Question No. 5 which must  
2 be viewed in context of the remainder of the verdict, and is  
3 therefore the only reading of the verdict that harmonizes any  
4 potential inconsistency as required by the Ninth Circuit in  
5 White. Hence, the monetary damages awarded by the jury can only  
6 be against Defendant Hill.

7 Concurrently with the filing of this order a Second Amended  
8 Judgment will also be filed which clarifies that the monetary  
9 damages assessed by the jury are against Defendant Hill, only.

10  
11 **CONCLUSION**  
12

13 Based on the foregoing, Defendants' Motion for Judgment as a  
14 Matter of Law, or alternatively for a new trial, is DENIED. The  
15 judgment in this matter will, however, be amended to reflect that  
16 the monetary damages imposed by the jury are solely against  
17 Defendant Hill and that a mistrial was declared on the issue of  
18 punitive damages.

19 IT IS SO ORDERED.  
20

21 DATED: September 28, 2005  
22

23  
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25 MORRISON C. ENGLAND, JR.  
26 UNITED STATES DISTRICT JUDGE  
27  
28